Supreme Court, U.S.
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No. 03 - 18 JUL 1 - 2003

In the Supreme Court of the United States

ADRIAN D. HORIEN,

Petitioner,

v.

CITY OF ROCKFORD,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rockford, Illinois, makes it a misdemeanor to "cause or create," at "any time," "any noise" that is (a) "unnecessary or unusual," and that (b) "annoys" another person or "endangers" or "injures" another's "comfort" or "repose." Petitioner was convicted based on his participation in a peaceful protest, during daylight hours, on a public sidewalk outside an abortion clinic in a commercially zoned area of Rockford. The "annoying noise" he was punished for making was the sound of his own unamplified voice, used to chant or shout statements of moral opposition to abortion towards people who were entering the clinic from an adjacent parking lot some distance away. Petitioner's repeated message ("Mommy, daddy, please don't kill me") was delivered in a falsetto in order to imitate the cry of a child, and he used a loud voice because the clinic was broadcasting music at the protesters over loudspeakers to drown them out. This case presents the following questions:

1. Whether the decision below should be summarily reversed, or at least reviewed by this Court, because it is at odds with (a) *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), which held that a ban on "annoying" behavior is facially unconstitutional under the Due Process Clause and First Amendment, and (b) numerous other lower-court decisions.

2. Whether the Rockford "nuisance noises" ordinance is content based and thus subject to strict scrutiny, or instead is a content-neutral "time, place, or manner" restriction that is narrowly tailored to serve a significant governmental interest and leaves open ample alternative means of communication.

3. Whether the Rockford ordinance, as applied to petitioner, violates the First Amendment because it punishes the use of an unamplified human voice during a peaceful political protest on a public sidewalk, where the features that make the speech "annoying" and thus unlawful are inextricably linked to the protester's message (the falsetto) or necessary to overcome efforts by the intended audience to drown out the protester's message (the loud volume).

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OPINIONS BELOW

The opinion of the appellate court (App., *infra*, 1a-9a) is unreported. The order of the Supreme Court of Illinois denying leave to appeal (App., *infra*, 10a) is unreported.

JURISDICTION

The judgment of the appellate court was entered on December 20, 2002. The order of the Illinois Supreme Court denying leave to appeal was entered on April 2, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The City of Rockford's "nuisance noises" ordinance (Rockford Code of Ordinances ch. 17, § 17-10(a)) provides, in pertinent part, that "[i]t shall be unlawful to cause or create any unnecessary or unusual noise at any time which annoys, injures, or endangers the comfort, repose, health or safety of others, unless such noise is necessary for the protection or preservation of property, or the health, safety, or life of some person." Other pertinent provisions of the Rockford anti-noise ordinances are set forth at App., *infra*, 11a-15a.

STATEMENT

The City of Rockford, Illinois, makes it illegal – punishable by fines and imprisonment for up to six months – to "annoy" someone with "unusual" or "unnecessary" noise. But that could mean anything, since there's always someone annoyed by almost everything. Petitioner apparently "annoyed" someone as he protested on a public sidewalk outside an abortion clinic because he spoke loudly and in falsetto; the same ordinance would cover Placido Domingo if he annoyed someone when singing "Quand'ero paggio" from Verdi's *Falstaff* or any "annoying" performance partly in falsetto by the Bee Gees or Frankie Valli.

No one faced with such a law could possibly know whether he might be breaking it – and the law would proscribe quintessential political speech that causes some annoyance in a listener.

For precisely those reasons, this Court ruled in *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), that a prohibition on annoying others is unconstitutionally vague in violation of the Due Process Clause and unconstitutionally overbroad in violation of the First Amendment. Scores of cases have followed *Coates*, striking down on vagueness and overbreadth grounds noise ordinances indistinguishable from Rockford's. In upholding petitioner's conviction, the Illinois Appellate Court simply ignored *Coates* and its progeny and relied instead on two fifty-year-old Illinois Supreme Court decisions that predate the relevant decisions of this Court. The Court should grant the petition and summarily reverse. At a minimum, this Court should address the important constitutional issues raised in this case.

1. Petitioner Adrian Horien opposes abortion on moral and religious grounds. On the morning of June 8, 2001, he and others stood on the public sidewalk near the entrance to a driveway leading to the Northern Illinois Women's Center in Rockford, a clinic that provides abortion services. Mr. Horien and his fellow protesters sought to communicate the message that abortion is wrong, and he called out in a loud, falsetto voice to people entering or leaving the clinic from a parking lot adjacent to the clinic entrance. Robert Stone, who lived a block away from the clinic, approached petitioner and asked him to lower his voice because the sound of petitioner's voice was allegedly bothering Stone in his home. When petitioner refused, Stone called the police, who came to the clinic and issued Horien a citation for violating the Rockford ordinance by "annoying and disturbing the comfort of Robert Stone." App., *infra*, 2a.

2. Proceeding *pro se*, Mr. Horien filed a motion to dismiss the charge or in the alternative for a declaratory judgment. In his supporting brief, petitioner argued that the Rockford ordinance – both on its face and as applied to him – violated the First and Fourteenth Amendments to the United States Constitution because it was unduly vague and infringed his free speech

rights. Among other authorities, petitioner cited *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971).

The City contended that the ordinance is not void for vagueness and that it constitutes a reasonable "time, place, or manner" restriction that targets noise rather than speech. The City maintained that *Coates* is distinguishable because Rockford's ordinance prohibiting "annoying" noises is "much more narrowly tailored" than the ordinance struck down in *Coates*, which prohibited persons from conducting themselves on a public sidewalk "in a manner annoying to persons passing by." See Rockford Br. in Opp. to Defendant's Motion, at 5.[1] The trial court, after a short hearing, denied petitioner's motion without explanation. See 10/29/01 Tr. 17.

3. At a bench trial, the City called as its first witness Robert Stone. Mr. Stone, a cartoonist, testified that on the morning of June 8 he had been supervising some remodeling work as he prepared to work from his home a block away from the clinic. With rotary floor sanders blasting on the first floor, and his windows closed, Stone testified, he heard someone "shouting very loudly, very annoyingly from down the street."

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[1] The City also invoked *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a vagueness challenge to a far narrower Rockford anti-noise ordinance that prohibited the willful making of a "noise or diversion" during school hours on property adjacent to a school, if the noise "disturbs or tends to disturb" the school session. This Court noted that the constitutional question in *Grayned* was "close," and it relied on the fact that the Illinois courts had interpreted the phrase "tends to disturb"– which on its own "might be troubl[ing]" in its "imprecision" – quite narrowly to include only those situations where there was an "imminent threat of violence." *Id.* at 110-11 (quoting *Chicago* v. *Meyer*, 44 Ill. 2d 1, 4 (1969), cert. denied, 397 U.S. 1024 (1970)). Moreover, the Court noted, the Rockford ordinance at issue in *Grayned* was "written specifically for the school context" and not "a vague, general 'breach of the peace' ordinance." *Id.* at 112. Finally, the Court distinguished *Coates* on the ground that the statute there "was impermissibly vague because enforcement depended on the completely subjective standard of 'annoyance[]'" whereas the Rockford school disruption ordinance "prohibited disturbances" that were "easily measured by their impact on the normal activities of the school." *Ibid.* In this case, the City has never disputed that its "nuisance noises" ordinance embodies a subjective standard.

12/12/01 Tr. 8; see also App., *infra*, 2a. Stone admitted that "[t]here's usually some noise from" the direction of the clinic because of frequent protests, but indicated that "there was a lot more noise on this particular day." 12/12/01 Tr. 7-8. Stone walked to the clinic and asked petitioner to "stop yelling." *Id.* at 10. After petitioner refused on the ground that "what he was doing was very important," Stone took offense at "the way [Horien] spoke to me" – but not, Stone took pains to add, "the words he used" – and Stone returned home and called the police. *Id.* at 11-12. Asked whether he had complained because of the content of Horien's message, Stone acknowledged that he knew of petitioner's views on abortion. He insisted, however, that "[m]y politics didn't enter it." *Id.* at 11. He was annoyed, rather, by the "volume" of Horien's voice. *Id.* at 11, 16.

Michael McDonald, the police officer who issued the citation, testified that, at the scene of the protests, he spoke with petitioner, who admitted that he had been using a loud voice to convey "his opinion to the patients coming and going from the clinic." 12/12/01 Tr. 19; see also App., *infra*, 3a. Consistent with Stone's complaint, McDonald stated that the "volume" of Horien's protests – and no other features – had resulted in a violation of the ordinance. *Id.* at 20-21.

Finally, the City called Wayne Webster, the owner of the building that houses the clinic. Webster testified that he was inside the clinic building in his security office, located on the second floor at the point where the building was only about 40 feet away from the protesters, when he heard loud noise coming from the street. 12/12/01 Tr. 24-25, 39, 45. Although Webster admitted that protests took place regularly at the clinic, and that on the day in question others were also protesting loudly, he testified that the others "weren't nearly as loud" as Horien. *Id.* at 26; see also App., *infra*, 3a. In addition, Webster testified, it was Horien's "falsetto, high-pitched voice" that "was so loud and so obnoxious and so annoying" to him and that made it "different" from other loud voices of protest. 12/12/01 Tr. 26, 35. Specifically, Webster noted, petitioner had used a loud

falsetto to chant "Mommy, daddy, don't kill me" as well as communicate other messages "of that nature." *Id.* at 36.[2]

After the City rested, Mr. Horien called William Landerholm, who had joined him on June 8 in protesting outside the clinic. Landerholm testified that on the morning in question the protesters were taking turns "lifting up our voices" so that their messages would "carry over to the parking lot to the women" going into the clinic entrance and "to overcompensate for the noise that normally comes out of the building." 12/12/01 Tr. 52-53; see also App., *infra*, 3a. Landerholm further testified that Webster regularly played music or the radio over an outdoor public address system and was doing so on the morning of June 8, and "[w]e believe it's to drown us out so that the clients cannot hear what it is that we have to say." 12/12/01 Tr. 53, 55. Landerholm also agreed that the amplified sound emanating from the building was loud enough to drown out "any human voice from the sidewalk addressing the people where they normally walk near the building," and he noted that the building's loudspeakers had been the subject of complaints in the past by neighbors. *Id.* at 53, 55. But for Webster's broadcasts over the loudspeakers, Landerholm testified, he would keep his voice low: "I would like not to have to shout to the women. In fact, I think it's counterproductive to why we are there." *Id.* at 56.

Landerholm also testified that the protest was entirely peaceful and "no louder" than any of the 100 or so previous protests outside the clinic. 12/12/01 Tr. 56, 59. He noted that Stone had never before complained about the noise of these pro-

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[2] Webster also testified that, when standing at the window in his security office (even with the window closed), he could hear petitioner engaged in normal conversation, because petitioner's conversational voice is "loud" and because the windows in the security office "are huge," made of "hundred-year-old glass," and "[s]ome of the caulking is bad in them, and there's no seal around them." 12/12/01 Tr. 45-46, 50; see *id.* at 50 ("[I]t's like standing in a park, [sound] just reverberates through the place"). The prosecution also introduced into evidence a videotape of the protests prepared by Mr. Webster.

tests, and appeared to be "very angry" and "very agitated" when he complained to Horien. *Id.* at 54, 58-59.

Petitioner also testified. He explained that he had used "various means in communicating our message" because "[w]hat speaks to one person doesn't speak to another person as effectively." 12/12/01 Tr. 61. By using the falsetto voice, he explained, he was "aiming" to "communicat[e] to the people a specific message that there is a human being * * * whose life will be terminated" if an abortion takes place. *Ibid.* Petitioner acknowledged that his "voice" was not the only means available to communicate his general opposition to abortion. *Id.* at 65.

The evidence also established that the clinic was located in an area zoned for commercial rather than residential uses. 12/12/01 Tr. 37-38. There was no evidence that any patient or employee of the clinic had been "annoyed" or that the operation of the clinic was in any way disrupted. Nor was there any evidence that petitioner was engaging in conduct that was threatening or anything other than entirely peaceful.

After the close of evidence, petitioner renewed his constitutional objections. 12/12/01 Tr. 70-76. Petitioner also argued that it was "quite incredible" that Stone, who lived "a full city block" away, could have heard and been annoyed by his voice through a closed window and over the din of power sanders operating on the floor below. *Id.* at 70.

The court held that Mr. Horien had violated the noise ordinance. In the judge's view, the case "was not about the content * * * of the speech, but the volume level." 12/12/01 Tr. 77. The court also stated that petitioner had "other methods" available for conveying his general opposition to abortion. *Id.* at 78; see also App., *infra*, 3a. The judge imposed fines (and costs) against Horien in the amount of $100.

4. The appellate court affirmed in an unpublished opinion. App., *infra*, 1a-9a. Without citing *Coates*, the court rejected petitioner's vagueness challenge, relying principally on two fifty-year-old Illinois Supreme Court decisions that involved industrial zoning ordinances. App., *infra*, 5a-6a (citing

City of Chicago v. *Reuter Bros. Iron Works*, 75 N.E.2d 355 (Ill. 1947), and *Dube* v. *City of Chicago*, 131 N.E.2d 9 (Ill. 1955), cert. denied, 350 U.S. 1013 (1956)). The appellate court also reasoned that the "plain language of the [Rockford] noise ordinance gives fair notice to the public and to the City that noise creating a nuisance is prohibited." *Ibid.*

Next, the Illinois appellate court rejected Mr. Horien's First Amendment challenge. It held that, although it obviously regulates protected speech, the ordinance is a valid time, place, or manner restriction. The ordinance is content neutral, the court held, because it "does not mention any type of speech" (such as advertising); the court did not address the ordinance's exception for protecting property and the lives of other persons. App., *infra*, 7a. Moreover, the court stated, the government has a significant interest in "regulating noise," and the ordinance was narrowly tailored "because [it] prohibits only sounds creating a nuisance." *Id.* at 8a. The appellate court also rejected Horien's argument that he had no alternative means of communicating his message to patrons who were disappearing behind a "privacy fence," reasoning that "the people arriving at the clinic walked or drove past the protesters before entering the parking lot." *Id.* at 7a.

Finally, the court rejected Horien's challenge to the sufficiency of the evidence under the governing standard of proof (which required the City, in this "quasi-criminal" proceeding, to prove a violation by "a clear preponderance of the evidence"). App., *infra*, 8a. The appellate court did, however, agree with Horien that Robert Stone's testimony was "inherent[ly] implausibl[e]." *Id.* at 7a. Even though the trial court had erroneously "credited Stone's testimony," and even though Stone was the only person Horien was charged with "annoying," the appellate court upheld Horien's conviction on the basis of the videotape evidence and the testimony of Webster.

5. Horien petitioned the Illinois Supreme Court for leave to appeal, again raising his facial and as-applied challenges to the ordinance under the Due Process Clause as well as the First

Amendment. The Illinois Supreme Court denied leave to appeal without comment. App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION AND SUMMARILY REVERSING

The Illinois courts have upheld a "quasi-criminal" conviction and fine for engaging in core political speech that was "annoying" to someone who heard it because it was loud and high-pitched. Petitioner's offense consisted of standing on a pubic sidewalk, the quintessential public forum, in an area zoned for commercial use, and speaking about abortion, a quintessentially political topic, in a loud voice. He spoke during daylight hours. He spoke without electronic amplification, but raised his voice in order to be heard over amplified music broadcast by the clinic and intended to drown him out. And he spoke in a falsetto tone, imitating a child's voice, precisely in order to communicate his message effectively that abortion involves the death of children.

The decision below so far departs from this Court's settled jurisprudence that the Court should grant the petition for certiorari and summarily reverse. Even if the Court does not summarily reverse, it should grant the petition to address the important issues presented in this case.

I. Summary Reversal Is Warranted Because The Lower Court's Holding That Rockford's "Nuisance Noises" Ordinance Survives A Facial Challenge For Vagueness And Overbreadth Conflicts With Decisions Of This Court And Of Many Lower Courts

The appellate court has upheld petitioner's conviction under a municipal ordinance that makes it a misdemeanor – punishable by fines and incarceration of up to sixth months – to make "any noise," at "any time," in the City of Rockford, Illinois, if such noise is "unnecessary or unusual" and it either "annoys" some person or "endangers" or "injures" another's "comfort" or "repose." In rejecting petitioner's facial challenges on vagueness and overbreadth grounds to that penal proscription, the Illinois Appellate Court made no mention of this Court's bind-

ing decision in *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), which was discussed in the parties' briefs. Because the decision below cannot be reconciled with *Coates*, summary reversal is appropriate.

A. *Coates* involved a Cincinnati ordinance that made it a crime for "three or more persons to assemble * * * on any of the sidewalks" within the city "and there conduct themselves in a manner annoying to persons passing by." 402 U.S. at 611 & n.1. That ordinance, this Court wrote, is unconstitutionally vague, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that *no standard of conduct is specified at all*." *Id.* at 614 (emphasis added). Because "[c]onduct that annoys some people does not annoy others," citizens "of common intelligence must necessarily guess at [the ordinance's] meaning." *Ibid.* (internal quotation marks omitted). Nor does it matter, this Court explained, that the Cincinnati ordinance "is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit." *Ibid.* Although Cincinnati "is free to prevent people from blocking sidewalks * * * or [engaging in] other forms of antisocial conduct * * * through * * * ordinances directed with reasonable specificity toward the conduct to be prohibited," it "cannot constitutionally do so through * * * an ordinance whose violation may entirely depend on whether or not a policeman is annoyed." *Ibid.*

The Court proceeded to conclude that Cincinnati's ban on "annoying" conduct "also violates the constitutional right of free assembly and association." 402 U.S. at 615. "The First and Fourteenth Amendments," the Court explained, "do not permit a State to make criminal the exercise of a right of assembly simply because its exercise may be 'annoying' to some people." *Ibid.* Were it otherwise, the Court added, "the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct." *Ibid.* "And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against

those whose association together is 'annoying' because their ideas, their lifestyle, or the physical appearance is resented by the majority of their fellow citizens." *Id.* at 616. Because the ordinance "makes a crime out of what under the Constitution cannot be a crime," it violated the First Amendment. *Ibid.*

This Court's decision in *Coates* represented a continuation of prior case law. In *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the Court overturned the convictions of a group of black protesters under a South Carolina "breach of the peace" law prohibiting "violation[s] of public order" and "disturbance of the public tranquility." Objecting to segregationist policies, the protesters had marched to the State Capitol and, after being ordered by the police to disperse or face arrest, had engaged in "loud," "boisterous," and "flamboyant" conduct, including "listening to a 'religious harangue' by one of their leaders, and loudly singing * * * patriotic and religious songs, while stamping their feet and clapping their hands." *Id.* at 233. In reversing the convictions, this Court explained that South Carolina's breach-of-the-peace crime was "so generalized as to be, in the words of the South Carolina Supreme Court, 'not susceptible of exact definition.'" *Id.* at 237. Any such penal statute, which "'upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment'" of an individual's use of "'the opportunity for free political discussion,'" is contrary to the First Amendment. *Id.* at 238 (quoting *Stromberg* v. *California*, 283 U.S. 359, 369 (1931)).

Similarly, in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), this Court overturned a "breach of the peace" conviction of the leader of a civil rights demonstration involving several thousand students. The alleged crime occurred when, after an orderly demonstration that nonetheless included the loud singing of hymns such as "We Shall Overcome" and loud clapping and cheering, the leader of the protest made the "inflammatory" suggestion that the assembled students should proceed to sit in at local lunch counters to protest racial segregation. *Id.* at 542, 546-49. This Court held that the "breach of the peace" offense – which made it a crime "to agitate, to arouse from a state of

repose, to molest, to interrupt, to hinder, [or] to disquiet" – was "unconstitutionally vague in its overly broad scope." *Id.* at 551.

In *Saia* v. *New York*, 334 U.S. 558 (1948), this Court reversed the conviction of a minister of the Jehovah's Witnesses for using sound amplification equipment (a loudspeaker) in giving a lecture in a public park, without first obtaining a permit from the police. The ordinance at issue made it a punishable nuisance, among other things, to use a loudspeaker in a way that produced "sounds" that "can be heard to the *annoyance* or inconvenience of travelers upon any street or public places." *Id.* at 558 n.1 (emphasis added), 560. That ordinance, the Court held, was "unconstitutional on its face." *Id.* at 559-60.

B. Since *Coates*, numerous lower court decisions have invalidated on either Due Process or First Amendment grounds local ordinances that punish behavior (or noise) on the ground that it may be subjectively "annoying" to others.

1. Illustrative of the void-for-vagueness cases is *State* v. *Indrisano*, 640 A.2d 986 (Conn. 1994), which involved a conviction for violating a statute that criminalized "offensive or disorderly conduct" that "annoys or interferes with another person." The Connecticut Supreme Court held that the statute was void on its face under *Coates*: "the Supreme Court of the United States has held that the term 'annoying,' when used to proscribe conduct, is unconstitutionally vague." *Id.* at 997.

Similarly, in *Thelen* v. *State*, 526 S.E.2d 60 (Ga. 2000), the Georgia Supreme Court, relying on *Coates*, reversed a conviction of someone who landed his helicopter on a dock and was charged with violating an ordinance identical to Rockford's. The court explained that "whether [such] noise * * * is 'unnecessary,' 'unusual,' or 'annoying' * * * certainly depends on the ear of the listener" and, accordingly, the statute was unconstitutionally vague as applied. *Id.* at 62. The Supreme Court of Alaska reached a similar conclusion in *Marks* v. *City of Anchorage*, 500 P.2d 644 (1972): an ordinance that prohibited disorderly conduct undertaken with the purpose of causing someone "inconvenience, annoyance or alarm" was

unconstitutional on its face because it "contain[ed] language that the United States Supreme Court has specifically declared to be impermissibly vague." *Id.* at 646 (citing *Coates*). Many other courts have reached exactly the same conclusion.[3]

But it gets worse. The Rockford ordinance bans not just annoying *behavior*, but annoying *noise* – which means, of course, it bans annoying *speech*. Where an ordinance is "capable of reaching expression sheltered by the First Amendment," this Court has held, the Due Process Clause requires "a greater degree of specificity than in other contexts." *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); see *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967). "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California*, 361 U.S. 147, 151 (1959). It therefore follows *a fortiori* from *Coates* – which involved annoying behavior – that ordinances prohibiting subjectively annoying noise in the form of speech are constitutionally proscribed. Indeed, numerous courts have struck down variations on Rockford's theme as facially unconstitutional.

For instance, *Nichols* v. *City of Gulfport*, 589 So. 2d 1280 (Miss. 1991), invalidated an ordinance *identical* to Rockford's, prohibiting "unnecessary or unusual noise[]" that "annoys, injures, or endangers the comfort, repose, health, or safety of others." Because the noise ordinance involved speech, the

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[3] See, *e.g.*, *Kramer* v. *Price*, 712 F.2d 174 (5th Cir. 1983) (Wisdom, J.) (relying on *Coates*; statute prohibited conduct that "annoy[s]" or "alarm[s]" someone), vacated, 723 F.2d 1164 (1984) (vacated after statute repealed); *State* v. *Bryan*, 910 P.2d 212 (Kan. 1996) (relying on *Coates*; statute prohibited conduct that "seriously alarms, annoys or harasses" someone); *People* v. *Norman*, 703 P.2d 1261 (Colo. 1985) (statute prohibited conduct that "alarm[s] or seriously annoy[s] another person"); *May* v. *State*, 765 S.W.2d 438 (Tex. Crim. App. 1989) (statute prohibited "annoy[ing]" or "alarm[ing]" someone); *City of Everett* v. *Moore*, 683 P.2d 617 (Wash. App. 1984) (same); *State* v. *Dronso*, 279 N.W.2d 710 (Wis. App. 1979) (same); *Poole* v. *State*, 524 P.2d 286 (Alaska 1974) ("disturb" or "annoy"); *State* v. *Jamgochian*, 279 A.2d 923 (R.I. 1971) (same).

Mississippi Supreme Court gave it "heightened scrutiny." *Id.* at 1283 (citing *Keyishian*, *supra*). And *Coates*, the court held, was controlling: "If beauty is in the eye of the beholder, whether a noise is 'unnecessary,' 'unusual,' or 'annoying' certainly depends upon the ear of the listener." *Id.* at 1284; accord *United Pentecostal Church* v. *Steendam*, 214 N.W.2d 866 (Mich. App. 1974) (striking down ordinance identical to Rockford's).

Similarly, in *People* v. *New York Trap Rock Corp.*, 442 N.E.2d 1222 (N.Y. 1982), the New York Court of Appeals struck down on its face an ordinance that (like Rockford's) prohibited "excessive or unusually loud sound or any sound which either annoys, disturbs, injures, or endangers [anyone's] comfort, repose, health, peace, or safety." Such an ordinance posed the risk that a conviction "could rest solely upon the malice or animosity of a cantankerous neighbor," which the Constitution plainly forbids. *Id.* at 1227 (internal quotation marks omitted). In like manner, the Fourth Circuit has held that a proscription against "unnecessary" noise "is unconstitutionally vague." *Jim Crockett Promotion, Inc.* v. *City of Charlotte*, 706 F.2d 486, 489 (1983). Numerous other cases have struck down noise ordinances similar to Rockford's on vagueness grounds.[4]

2. Just as numerous courts have followed *Coates* in invalidating "annoying" noise ordinances on vagueness grounds, so too have many courts struck down such laws as unconstitutionally overbroad in violation of the First Amendment. This is hardly surprising: as this Court has explained, the two doctrines – void-for-vagueness and overbreadth – are "logically related

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[4] *E.g.*, *Lionhart* v. *Foster*, 100 F. Supp. 2d 383 (E.D. La. 1999) (ordinance prohibited making noise "in a manner likely to disturb, inconvenience, or annoy"); *Dupres* v. *City of Newport*, 978 F. Supp. 429 (D.R.I. 1997) (ordinance prohibited noise that "annoys, disturbs, injures or endangers [anyone's] comfort, repose, peace or safety"); *Dae Woo Kim* v. *City of New York*, 774 F. Supp. 164 (S.D.N.Y. 1991) (same); *Fratiello* v. *Mancuso*, 653 F. Supp. 775 (D.R.I. 1987) (ordinance prohibited "unnecessary noises or sounds" that "are physically annoying"); *Luna* v. *City of Ulysses*, 17 P.3d 940 (Kan. App. 2000) (ordinance prohibited "any unnecessarily loud or excessive noise or sound" that is "physically or mentally annoying or disturbing").

and similar." *Kolender* v. *Lawson*, 461 U.S. 352, 358 n.8 (1983); see also *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

For example, in *Marks* v. *City of Anchorage*, *supra*, the Alaska Supreme Court held that a proscription against disorderly conduct with the purpose of causing someone "inconvenience, annoyance or alarm" was unconstitutionally overbroad because of its "chilling effect" on the exercise of constitutional rights. 500 P.2d at 646-49. Similarly, in *State* v. *Dronso*, 279 N.W.2d 710 (Wis. App. 1979), the court held that a "statute which subjects a telephone caller to criminal sanctions * * * for calling with intent to annoy * * * is overbroad as it may reasonably be interpreted to prohibit free speech which is constitutionally protected." *Id.* at 714. Other decisions finding similar statutes overbroad are legion. See, *e.g.*, *State* v. *Anonymous*, 389 A.2d 1270 (Conn. App.) (prohibition on conduct that "annoys or interferes with another person" is overbroad), cert. denied, 174 Conn. 803 (1978); *Long* v. *State*, 931 S.W.2d 285, 290 n.4 (Tex. Crim. App. 1996) ("The First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed.") (citing *Coates*).[5]

Indeed, even the Illinois Supreme Court – which declined to disturb the decision below upholding petitioner's conviction – has, in a case not involving an abortion protester, invalidated

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[5] See also *Campa* v. *City of Birmingham*, 662 So. 2d 917, 918-19 (Ala. Crim. App. 1993) (ordinance making it illegal to "make * * * any noise which either annoys, disturbs, injures, or endangers the comfort, repose, health, peace or safety of others in the city" is not "narrowly drafted to avoid unnecessarily restricting competing First Amendment freedoms"); *People* v. *Dietze*, 549 N.E.2d 1166, 1168 (N.Y. 1989) ("Casual conversation may well be 'abusive' and intended to 'annoy'; so, too, may be light-hearted banter or the earnest expression of personal opinion or emotion."); *People* v. *Norman*, 703 P.2d 1261, 1266-67 (Colo. 1985) ("the terms 'annoy' and 'alarm,' when given their conventional meanings, [are] so broad that the most innocuous comment about a debatable or unpleasant topic might subject a person to criminal prosecution" for harassing someone); *Dae Woo Kim*, 774 F. Supp. at 170 (ordinance proscribing noise that is "unnecessary" and "annoys" or "disturbs" others is overbroad).

a similar law on overbreadth grounds. See *People* v. *Klick*, 362 N.E.2d 329, 332 (Ill. 1977) (disorderly conduct law proscribing the making of telephone call with an "intent to annoy another") (citing *Coates*). In that case (which Horien called to the Illinois Supreme Court's attention in unsuccessfully seeking leave to appeal), the Illinois Supreme Court criticized the disorderly conduct law for subjecting "callers to the stigmatization of the criminal process at the election of their listeners who might perceive the call as having been made with the intent to annoy." *Ibid.* It also explained that "[t]he legislature cannot abridge one's first amendment freedoms merely to avoid slight annoyances caused to others." *Ibid.* So, too, here.

C. The Illinois Appellate Court's decision in this case is inconsistent with *Coates* and with the other many other cases cited above. The ordinance struck down in *Coates* made it a crime for "three or more persons to assemble" on "any of the sidewalks" within the city "and there conduct themselves in a manner *annoying* to persons passing by." 402 U.S. at 611 & n.1 (emphasis added; internal quotation marks omitted). That ordinance is indistinguishable, in its pertinent language, from the Rockford law at issue here, which proscribes the making of "unnecessary or unusual" noise that "annoys" another person or "endangers" or "injures" another's "comfort" or "repose." If anything, the Rockford law is *broader and more indeterminate* because it covers the creation of "any noise," at "any time," anywhere within the city, so long as it is subjectively annoying to the hearer, whereas the Cincinnati law in *Coates* was limited to conduct occurring on the public sidewalks that was annoying to passersby. Though the Rockford ordinance covers noise rather than conduct, that only strengthens the constitutional objection, as explained above. And, of course, in the case of both ordinances the core criminal proscription against causing subjective "annoyance" to another is utterly lacking in any ascertainable standard for guiding conduct.

D. Completely ignoring petitioner's citation of *Coates*, the appellate court instead relied largely on two fifty-year-old Illinois Supreme Court decisions. App., *infra*, 5a-6a (citing *City*

of Chicago v. *Reuter Bros. Iron Works*, 75 N.E.2d 355 (Ill. 1947), and *Dube* v. *City of Chicago*, 131 N.E.2d 9 (Ill. 1955), cert. denied, 350 U.S. 1013 (1956)). In addition to lacking precedential force in the face of controlling authority from this Court, those decisions are readily distinguishable: both involve the application of narrowly tailored zoning ordinances, and both featured language that is materially different from that of the Rockford misdemeanor anti-noise ordinance. In *Reuter Bros.*, the Illinois Supreme Court rejected a vagueness challenge to a zoning ordinance that authorized "manufacturing," including the activity of "[f]abricating, other than snap riveting or processes used in bending and shaping of metals which *emit noises of a disagreeable or annoying nature*, for assembling metal products, forging of metals, melting, [and] casting of metals * * *." 75 N.E.2d at 357 (emphasis added) (internal quotations marks omitted). Read in context, the court explained, the words "disagreeable or annoying" together convey a "common law meaning" signifying noise that would constitute a nuisance at common law.

The Rockford ordinance, however, contains much broader language. As a general matter, the ordinance applies to any noise occurring anywhere in the City of Rockford, at any time, so long as the noise is "unnecessary or unusual" and it "annoys" another person or "endangers" or "injures" another's "comfort" or "repose." And even if this language were interpreted as describing common law nuisances, that would hardly remove the fatal ambiguity and overbreadth under this Court's decisions. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" W. KEETON ET AL., PROSSER AND KEETON ON TORTS 616 (5th ed. 1984). Thus, the term "nuisance" has "meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." *Ibid.* (footnotes omitted; emphasis added). The appellate court's decision accordingly does nothing to remove the essential ambiguity or overbreadth of the criminal

proscription; indeed, it compounds it. See also *Saia*, 334 U.S. at 560 (invalidating penal ordinance forbidding the use of sound amplification device even though ordinance was "dressed in the garb of the control of a 'nuisance'"). The sweeping breadth of the Rockford ordinance, moreover, is abundantly clear from the appellate court's holding that petitioner's speech *in this case* qualified as a forbidden "nuisance."

E. Summary reversal is warranted because, under this Court's precedents, the Rockford ordinance is unconstitutionally vague as well as overbroad.[6] Due process, as this Court has made clear, requires that a law be sufficiently clear on its face to enable citizens to order their behavior – and thus a law "fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). Due process also requires that a law be sufficiently clear that it not lead to arbitrary enforcement by allowing "policemen, prosecutors, and juries to pursue their personal predilections." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) (internal quotation marks omitted).

The Rockford "nuisance noises" ordinance is fatally ambiguous. How is someone supposed to know what might be "unnecessary" or "unusual" or "annoying" to someone else, and how is a police officer in any way constrained from arresting someone on a whim or because of disagreement with the speaker's message? Respondent has never disputed in this case

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[6] This Court has not hesitated to order summary reversal of state court decisions that ignored the teachings of *Coates*, *Edwards*, *Cox*, or *Saia*. See, *e.g.*, *Norwell* v. *City of Cincinnati*, 414 U.S. 14 (1973) (per curiam) (reversing decision of intermediate Ohio appellate court that had affirmed conviction under ordinance prohibiting disorderly conduct done "with the intent to * * * annoy any person"); *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964) (per curiam) (reversing decision of South Carolina Supreme Court that ignored *Edwards*); *Fields* v. *South Carolina*, 375 U.S. 44 (1963) (per curiam) (same); see also *Karlan* v. *City of Cincinnati*, 416 U.S. 924 (1974) (per curiam). At a minimum, the Court should vacate the decision below and remand with instructions to consider this Court's decision in *Coates*.

that the question whether noise is "annoying" hinges on a subjective standard and thus rests solely on the sensibilities of the beholder: what might annoy one person might not annoy another, and someone protesting on the public sidewalk would have no way of knowing whether he was breaking the law. Faced with a similar ordinance in *Coates*, this Court explained that the ordinance was "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'" 402 U.S. at 614 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)).

Like the void-for-vagueness doctrine, the First Amendment overbreadth doctrine protects against the dangers of standardless discretion that inhere in statutes regulating the fringes of First Amendment-protected activity. Overbroad restrictions on activity protected by the First Amendment also present concerns of self-censorship. "Where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972); see also *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2196 (2003).

Substantial overbreadth occurs if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (internal quotation marks omitted). Thus, in *Coates*, this Court held that the ban on annoying behavior was "unconstitutionally broad" on its face even though the ordinance could constitutionally be applied to littering or blocking sidewalks. 402 U.S. at 611. A prohibition of "annoying" behavior also contains "an obvious invitation to discriminatory enforcement" against people whose "ideas * * * [are] resented by the majority of their fellow citizens." *Id.* at 616. The same

analysis condemns the Rockford ordinance in this case.

F. This case provides a compelling illustration of the dangers of vague and overbroad criminal provisions – especially those that may be applied to punish core political expression protected by the First Amendment. Petitioner had no way of knowing that the tone and volume of his voice would annoy Mr. Stone (or anyone else); indeed, he had earlier protested in a loud falsetto, apparently without "annoying" anyone. Nor, for that matter, does petitioner have any way of knowing any better *after* his conviction how to go about exercising his right to speak in the quintessential public forum of the sidewalk outside of the Rockford clinic without running afoul of the anti-noise ordinance. He was convicted of speaking in falsetto. Would he annoy someone if he spoke in basso profundo? A foreign accent? A Homer Simpson voice? And what standards would the police apply in deciding how "annoying" is "annoying"? Because the answer to questions like these is anybody's guess, this Court held in *Coates* that irredeemably vague laws that proscribe "annoying" behavior are unconstitutional on their face.

Unfortunately, this case also illustrates the risk of abuse that accompanies such laws. See *Saia*, 334 U.S. at 562 ("Annoyance at ideas can be cloaked in annoyance at sound."). Petitioner was prosecuted and convicted on the strength of a complaint by Robert Stone, a neighbor who lived a block away and claimed to have been "annoyed" by petitioner's voice behind closed windows and over the sound of floor drum sanders blasting away on the floor beneath him. But Stone's story was so ludicrous that the *appellate* court disregarded it as "inherent[ly] implausibl[e]." App., *infra*, 8a. In so doing, moreover, the appellate court pointedly noted that Landerholm, petitioner's fellow protester, "suspected that Stone was annoyed by the protester's message rather than by the volume of [Horien's] voice." *Ibid.* Yet Stone's complaint was the exclusive basis for summoning the police in the first place, not to mention the only predicate for petitioner's citation.

Despite these concocted allegations by Stone, the appellate court saw fit to uphold the conviction based on the testimony of

a *different* witness: Wayne Webster, the building's owner, whose testimony clearly expressed his irritation at having to deal with the repeated protests outside the commercial property he owned. Worse yet, the evidence clearly established that Webster had routinely broadcast the radio from loudspeakers mounted on the building towards the protesters in an effort to drown out their speech – and, indeed, was doing so on the date of the incident in question. (Notably, this too can be a violation of the Rockford anti-noise ordinance, see § 17-8 (App., *infra*, 13a), yet Webster was not cited by the Rockford police.) The appellate court nevertheless relied on Webster's testimony that he was "annoyed" by the loud speech that petitioner was using precisely to overcome Webster's efforts to silence him. That is a novel – and deeply troubling – theory of criminal "annoyance" if ever there was one. See also *Lawrence* v. *Texas*, slip op. 15 (U.S. June 26, 2003) (conviction for a "class C misdemeanor" that is a "minor offense" under state law nevertheless carries a "stigma" that is "not trivial," imposes other collateral consequences, and "remains a criminal offense with all that imports for the dignity of the person charged").

II. The Court Should Clarify Whether A Ban On "Unnecessary" And "Annoying" Speech Is Content Based Or Content Neutral And Whether The Rockford Ordinance, As Applied, Violates The First Amendment

If the Court elects not to reverse summarily, then it should grant review of all three issues presented in this petition. As just explained, the facial challenge to the Rockford ordinance is deserving of review because the rejection of that challenge below conflicts with this Court's decisions and the decisions of many lower courts. That issue is also of surpassing importance and – as shown by the numerous cases cited above – is recurring in nature. Moreover, if the Court grants plenary review of the question relating to petitioner's facial challenges, then it should also grant review of the second and third questions presented. Those questions raise as-applied arguments under the First Amendment that are closely related to the facial challenges; they would allow the Court to consider all the First Amendment

issues at once (and preserve the Court's ability to resolve the case in petitioner's favor on a narrow, as-applied basis); and they implicate several doctrinal issues that are important and would benefit from clarification by the Court.

A. The appellate court held that, although the Rockford ordinance undisputably "places restrictions on expression protected by the first amendment," it is content neutral because it "does not mention any type of speech" and "merely prohibits unnecessary sound that interferes with others' comfort, repose, health, or safety." App., *infra*, 6a-7a. In reaching that conclusion, the court did not discuss the ordinance's exception for "annoying" noise that is "necessary" to protect property or "the health, safety, or life of some person." The lower court also concluded that the ordinance survives the intermediate scrutiny test applicable to "time, place, or manner" restrictions because it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative means of communication. The government has a significant interest in "regulating noise," the court reasoned, and the ordinance is narrowly tailored because it "prohibits only sounds creating a nuisance." *Id.* at 8a. The court rejected petitioner's argument that alternative means were unavailable for communicating his message to his intended audience: the patients and workers who were disappearing behind a "privacy fence" at the clinic. *Ibid.*

B. Whether a restriction on speech is content based or content neutral is often dispositive. Content-based restrictions are subject to strict scrutiny and are presumptively unconstitutional; they survive only if the government shows that they are "necessary to serve a compelling state interest and * * * narrowly drawn to achieve that end." *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). Content-neutral restrictions, in contrast, are subject to laxer, intermediate scrutiny; they are constitutional if they are "narrowly tailored to serve a significant governmental interest, and * * * leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). "The principal inquiry in

determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Thus, "content-neutral speech restrictions [are] those that are *justified* without reference to the content of the regulated speech." *Boos* v. *Barry*, 485 U.S. 312, 320 (1988) (internal quotation marks omitted).

Yet distinguishing between the two is not so easy. Cf. *Hill* v. *Colorado*, 530 U.S. 703 (2000). In *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a city imposed zoning restrictions on adult theaters, but not on other types. Even though adult theaters were singled out, the Court held, the zoning laws were content-neutral: the city ordinance was aimed not at the content of the movies being shown, but at their "secondary effects" (such as increased crime or decreased property values). In *Boos*, the challenged restriction "prohibited the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" 485 U.S. at 315. Relying on *Renton*, the city defended its ordinance on the ground that restricting criticism was also aimed at the secondary effects of the speech – "to shield diplomats from speech that offends their dignity." *Id.* at 320. This Court distinguished *Renton* (*id.* at 321):

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. * * * The emotive impact of speech on its audience is not a secondary effect.

The ordinance outlawing critical speech was, by contrast, justified based on the content (whether the speech was critical), and was therefore subject to "the most exacting scrutiny." *Ibid.*

Similarly, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 (1992), involved an ordinance imposing a parade-permit fee that varied depending on the cost of security required for the parade. *Id.* at 126-27. The county argued that the costs imposed on a parade organizer were aimed at secondary effects of the speech – "the cost of maintaining public order." *Id.* at 134. This Court noted that the variance in the cost related to "the amount of hostility likely to be created by the speech based on its content." *Ibid.* Because the restriction on the speech was directly tied to "the public's reaction to the speech," and speech was financially burdened "simply because it might offend a hostile mob," the restriction was content based. *Id.* at 134-36.

Given the indeterminacy of the concept of "annoyance," it should come as no surprise that courts are divided over whether a law making it illegal to "annoy" someone is content based. *Township of Plymouth* v. *Hancock*, 600 N.W.2d 380 (Mich. App. 1999), appeal denied, 618 N.W.2d 585 (Mich. 2000), involved a constitutional challenge to an ordinance making it illegal to "unreasonably annoy or disturb" someone through "vulgar conduct"; the court held that the ordinance was content neutral because it "does not attempt to regulate speech on the basis of its message" (600 N.W.2d at 384 n.3). The Michigan Supreme Court denied leave to appeal, but two justices dissented: "Although, at first blush, the ordinance appears to be a restriction on noise that would be subject to less scrutiny, close examination of the ordinance language reveals that it does address content." 618 N.W.2d at 586.

Moreover, at least two cases have held that noise ordinances functionally indistinguishable from Rockford's are content based. In *Dupres* v. *City of Newport*, 978 F. Supp. 429 (D.R.I. 1997), the court invalidated an ordinance that proscribed the "making, creation or permitting" of "any unreasonably loud, disturbing or unnecessary noise * * * or * * * noise * * * which either steadily or intermittently annoys, disturbs, injures or endangers the comfort, repose, peace or safety of any individual." *Id.* at 431. The ordinance was content based, the court held, because it allowed "law enforcement and others" to

determine "whether the ordinance has been violated on purely subjective, content-based criteria" – that is, whether noise was "annoying" or "unnecessary." *Id.* at 435. Applying strict scrutiny, the court struck down the ordinance on its face.

Similarly, *Fratiello* v. *Mancuso*, 653 F. Supp. 775 (D.R.I. 1987), involved a noise ordinance that made it unlawful

> for any person to make, cause or suffer or permit to be made or caused upon any premises owned * * * by him, or upon any public street * * * unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons.

Id. at 790. The court held that, by prohibiting "unnecessary noises or sounds * * * which are physically annoying to persons," the ordinance "selectively proscribe[d] a certain category of speech; that which the listener views as 'annoying.' Such a subjective content-based restriction invites suppression of unpopular ideas." *Ibid.* Accordingly, the court held, the ordinance was facially invalid. *Ibid.*[7]

Because the Rockford ordinance is justified by "[l]isteners' reactions to speech" (*Boos*, 485 U.S. at 321) – whether listeners' are "annoyed"– the ordinance is content based and thus subject to strict scrutiny (which it cannot possibly survive, for the same reasons given below for why it cannot satisfy intermediate scrutiny). Two other aspects of the ordinance, as applied in this case, underscore its content-based nature. First, the ordinance contains an exception that hinges on the content of speech. Rockford has exempted annoying speech "necessary for the protection or preservation of property, or the health, safety, or life of some person." In this case, petitioner has consistently argued that his protests at the clinic fell within that exception

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[7] Other courts have ruled that a narrowing construction of an anti-noise provision is necessary to render it content neutral and thus avoid strict scrutiny. See, *e.g.*, *Eanes* v. *State*, 569 A.2d 604, 610 (Md.) (interpreting word "unseemly" in law prohibiting "loud and unseemly noise" as modifying the volume level of "loud" to ensure content neutrality), cert. denied, 496 U.S. 938 (1990).

because he was attempting to save the lives of unborn children. The lower courts rejected that argument, however, on the ground that "some person" did not cover an unborn child. Regardless of what one thinks of petitioner's argument, it is plain that the applicability of this exception turns on the content and meaning of petitioner's speech. Second, in this case the Illinois courts upheld petitioner's conviction in part because he used a falsetto – a feature of his protests that cannot be separated from his actual message (any more than a foreign accent could be separated, for example, from a satirical speech on American immigration policy). In these circumstances, the ordinance as applied to petitioner was content based.

C. Even if the Rockford ordinance is properly analyzed as a content-neutral "time, place, or manner" restriction, the question remains whether it both is narrowly tailored to serve a significant governmental interest and leaves open ample alternative means of communication. The appellate court concluded that the Rockford ordinance passed this test, but that conclusion was mistaken and inconsistent with this Court's decisions.

1. The Rockford ordinance contains no limitation at all as to "time" and no limitation as to place (beyond requiring that the noise occur in Rockford). Nevertheless, the lower court held that the ordinance was a reasonable "time, place, or manner" restriction, presumably because it functioned as a "manner" restriction limiting speech and other noises to those that were not "annoying," and was narrowly tailored.

This Court's decisions make clear, however, that *far greater precision* is required for municipal anti-noise ordinances to satisfy the narrow tailoring requirement. For example, in *Saia* v. *New York*, this Court struck down as "not narrowly drawn" a law that failed to "regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted," and that contained no such discernible standards and was "dressed in the garb of the control of a 'nuisance.'" 334 U.S. at 560. "Any abuses which loud-speakers can create," this Court explained, "can be controlled by narrowly drawn statutes." *Id.* at 562.

Similarly, in *Kovacs* v. *Cooper*, 336 U.S. 77, 83 (1949), a plurality of the Court, in upholding a ban on sound trucks, noted that the ordinance applied only to (a) vehicles, (b) operated on the public streets, (c) containing sound amplifiers or other instruments "emitting loud and raucous noises." The plurality observed that absolute prohibition on sound trucks would be "probably unconstitutional." *Id.* at 82, 85. Significantly, the plurality noted that the ordinance did not place restrictions on "the communication of ideas or discussion of issues *by the human voice*." *Id.* at 89. Concurring, Justice Frankfurter underscored this distinction, explaining that "[o]nly a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice." *Id.* at 96; accord *id.* at 97 (Jackson, J., concurring).

Finally, in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), the Court upheld against Due Process and First Amendment challenges a much narrower Rockford anti-noise ordinance prohibiting the willful making of a "noise or diversion" (a) on property directly adjacent to a school, (b) during school hours, if the noise (c) "disturbs or tends to disturb" the school session. See note 1, *supra*. In reaching that result, this Court relied on a narrowing construction that had been adopted by the Illinois courts (see *ibid.*), and it emphasized that, in contrast to the ordinance at issue in *Coates*, which embodied a "completely subjective standard of 'annoyance[],'" Rockford's school disruption ordinance "prohibited disturbances" that were "easily measured by their impact on the normal activities of the school." 408 U.S. at 112. Even then, the Court reasoned, the constitutional question in *Grayned* was "close." *Id.* at 109.

Judged by the same standards, the Rockford "nuisance noises" ordinance is *not* narrowly tailored. Indeed, it is far broader than the ordinance struck down in *Saia*, which was limited to the use of loudspeakers. And it features far less tailoring than the other provisions included in Rockford's anti-noise ordinances, many of which include precise decibel limitations, precise distance limitations, or precise time restrictions. See

App., *infra*, 11a-15a.[8]

Nor, as applied to petitioner's conduct, does the Rockford ordinance leave open ample alternative means of communication. See, *e.g.*, *Bay Area Peace Navy* v. *United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (invalidating 75-yard restriction on water-borne demonstrations aimed at audience of invited officials watching naval display from pier, despite possibility that demonstrators could pass out leaflets or demonstrate on land; explaining that "an alternative is not ample if the speaker is not permitted to reach the intended audience"); *Weinberg* v. *City of Chicago*, 310 F.3d 1029, 1041-42 (7th Cir. 2002) (restriction on selling book critical of Chicago Blackhawks hockey team within 1,000 feet of stadium where they played did not leave open ample alternative channels for speech, even though author remained free to sell book in other areas of city, through bookstores, or on the Internet), petition for cert. pending, No. 02-1710. In fact, the Rockford ordinance has the effect of preventing petitioner from effectively reaching his intended audience through the spoken word – or perhaps at all. See *Gilleo* v. *City of Ladue*, 512 U.S. 43, 45, 54-58 (1994) (invalidating ordinance that effectively eliminated entire mode of expression – protest from one's own doorstep – by barring homeowner's display of signs except for "residence

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[8] In enacting the Quiet Communities Act of 1978, Pub. L. 95-609, 92 Stat. 2079, Congress directed the Environmental Protection Agency (EPA), among other things, to "provide technical assistance to State and local governments" by preparing "model State or local legislation for noise control." 42 U.S.C. § 4913(f). In addition to a variety of highly specific provisions targeting various kinds of noises, EPA's Model Community Noise Control Ordinance includes a general proscription against the "*unreasonabl[e]*" making of "noise disturbances," a term elsewhere defined to include sounds that "annoy[] or disturb *a reasonable person* of *normal sensibilities*." Model Ordinance §§ 3.2.20, 6.1 (emphasis added) (*available at* http://www.nonoise.org/library/epamodel/epamodel.pdf). The Model Ordinance, moreover, expressly *exempts* political protest activities on public sidewalks from this general proscription against "noise disturbances." See *id.* § 6.1 ("Non-commercial public speaking and public assembly activities conducted on any public space or right-of-way shall be exempt from the operation of this Section.").

identification" and "for sale" signs and signs warning of safety hazards). It is no answer to say, as the lower court did, that petitioner remains free to stop chanting and to offer a pamphlet to those driving by and entering the parking lot in cars with the windows rolled up. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988).

2. Although the decision below is unpublished, it does not stand entirely alone. In recent years, two state supreme courts have issued narrowly divided decisions that similarly upheld criminal convictions, under local noise ordinances, of political protesters who did nothing more than use their unamplified voices to express their political views. As those cases demonstrate, there is a need for this Court to reaffirm the stringent constitutional limits on the power of government to impose criminal penalties in this situation.

Until recently, courts faced with such convictions have – like this Court in *Coates* – invalidated the underlying ordinances on vagueness or overbreadth grounds. Alternatively, they have provided sharply limiting constructions that avoided the First Amendment problems. Several state supreme courts, for example, have interpreted disturbing-the-peace or anti-noise laws, if applied to the "noise" created by political protesters, as requiring a showing that "there is a clear and present danger of violence or * * * the communication is not intended as such but is merely a guise to disturb persons." *In re Brown*, 510 P.2d 1017 (Cal. 1973) (indicating that this gloss was required to avoid First Amendment problems), cert. denied, 416 U.S. 950 (1974); see also *People* v. *Fitzgerald*, 573 P.2d 100, 104 (Colo. 1978) (same); *State* v. *Marker*, 536 P.2d 1273 (Or. Ct. App. 1975) (same) (citing additional cases).

More recently, however, the Maryland Court of Appeals upheld the conviction of a protester engaged in core First Amendment speech for "wilfully disturbing a[] neighborhood by loud and unseemly noises." *Eanes* v. *State*, 569 A.2d 604 (Md.), cert. denied, 496 U.S. 938 (1990). Late one morning,

Jerry Eanes stood on a public sidewalk in Hagerstown in front of an abortion clinic and in order to discourage abortion "preach[ed] the gospel of Jesus Christ" in a "very or extremely loud voice," "yelling and screaming at the top of his voice." *Id.* at 606, 607. A sharply divided court affirmed his conviction after construing the statute as prohibiting only "unreasonably" loud noise, and as requiring a prior warning by the police. *Id.* at 610, 617. So construed, the majority held, the statute "afford[ed] content-neutral protection to the captive auditor * * * who cannot avoid continuing, unreasonably loud and disruptive communications emanating from the street." *Id.* at 612.

Three of the seven members of the court dissented. As Judge Eldridge wrote for the dissenters, "apparently for the first time ever" a "state's highest court has upheld a criminal conviction based solely on the loudness of a single individual in delivering constitutionally protected speech with an unamplified human voice, in a permitted place and at a permitted time." 569 A.2d at 620. The defendant, the dissenters explained, had been "engaged in free speech in its 'most pristine and classic form'" (*id.* at 622 (quoting *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963)), expressing his views on "one of the most controversial political and social issues today." *Ibid.*

Even if the statute were content-neutral, the dissenters argued, it was not narrowly tailored to serve a significant government interest, and did not leave open ample alternative means of communication. Invoking the lessons of the civil rights protests of the 1960s, the dissenters also pointed to the dangers in application of the statute. A statute preventing even "unreasonable" sound could, even if "[t]heoretically" content neutral, be applied to suppress speech on the basis of its content: complainants and police would have "a powerful weapon which can easily be misused to suppress speech because of its content and because of the identity of the speaker." 569 A.2d at 624.

More recently, the South Carolina Supreme Court, by a 3-2 vote, similarly upheld a conviction of various street preachers for making "loud and unseemly noises" in delivering religious speeches on the main street of Beaufort, South Carolina.

Beaufort v. *Baker*, 432 S.E.2d 470 (S.C. 1993); see also *Asquith* v. *City of Beaufort*, 139 F.3d 408, 411 (4th Cir. 1998) (in reversing preliminary injunction entered against enforcement of same Beaufort noise ordinance, noting that ordinance was "copied from" the Maryland law at issue in *Eanes*). The majority relied largely on the Maryland Court of Appeals' decision in *Eanes*. The dissenters, in turn, took the majority to task for ignoring this Court's decisions. See *id.* at 477 (arguing that it was "astounding that an unamplified, non-threatening voice, at noon, on a public street in a commercial district, is speech which can be restricted").

Eanes and *Baker* have spawned considerable academic commentary, most of it highly critical. See, *e.g.*, Flynn, *Street Preachers v. Street Merchants: Will the First Amendment Be Held Captive in the Balance?*, 14 ST. LOUIS U. PUB. L. REV. 613 (1995); Sullivan, *Court Finds No First Amendment Conflict in Ban on "Loud and Unseemly" Speech*, 46 S.C. L. REV. 22 (1994); Note, 20 U. BALT. L. REV. 507, 517 (1991) (criticizing *Eanes* as "a threat to free speech"); compare Harvey, *Street Preaching v. Privacy: A Question of Noise*, 14 ST. LOUIS U. PUB. L. REV. 593 (1995) (defending decisions). As Professor Flynn has explained, "[s]treet preaching is an American tradition" that "pre-dates the Revolution" and "has always involved 'loud' speaking." 14 ST. LOUIS U. PUB. L. REV. at 615; see also *id.* at 615 & n.5 (noting that James Madison's belief in need for a First Amendment may have been informed by contemporaneous efforts by local governments to use "disturbing the peace" laws to curb loud itinerant preachers). "For most of our history, the free speech interests of street preachers have prevailed over audience complaints" and arguments based on the asserted need to protect a "captive audience." *Id.* at 641. As these decisions and academic commentary demonstrate, this important area of law would benefit from further clarification by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision summarily reversed; in the alternative, the petition should be granted and the case set for briefing and argument.

Respectfully submitted,

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JULY 2003

APPENDICES

APPENDIX A

[Stamped: "This Order Is Not Precedential And Is Not To Be Cited"]

[Filed stamp: Dec 20 2002] [court clerk's name omitted]

No. 2–02–0295

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF ROCKFORD, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Winnebago County
v.	)	No. 01-OV-840
ADRIEN D. HORIEN, Defendant-Appellant.	)	Honorable Brian Dean Shore, Judge, Presiding.

RULE 23 ORDER

Following a bench trial, defendant, Adrian D. Horien, was found guilty of violating the "nuisance noises" ordinance of the City of Rockford, and he was fined $100. Defendant, who proceeds *pro se*, admits that his conduct was intended to deter patients and workers from entering the Northern Illinois Women's Center, a facility that performs abortions. Defendant appeals the judgment, arguing that the ordinance is unconstitutional because it is vague and restricts free speech. He also challenges the sufficiency of the evidence. We affirm.

FACTS

The noise ordinance at issue provides that "[i]t shall be unlawful to cause or create any unnecessary or unusual noise at any time which annoys, injures, or endangers the comfort,

repose, health, or safety of others, unless such noise is necessary for the protection or preservation of property, or the health, safety, or life of some person." Chapter 17, Section 17–10(a), City of Rockford Code of Ordinances. The complaint alleged that defendant "stood on a public way yelling and screaming at patients of the Northern Illinois Women Center annoying and disturbing the comfort of Robert Stone."

At trial, Stone testified that, before 8:00 a.m. on June 8, 2001, he was upstairs in his home while workers were using rotary wood floor sanders downstairs. Even though the sanders were very loud, Stone heard a person shouting very loudly from the abortion clinic that was one block from Stone's residence. Stone did not understand what words were being shouted, but the repeated shouting was very annoying. His attempt to block the noise by shutting his window was unsuccessful. After approximately 20 minutes, Stone decided to ask the person to stop yelling.

When he arrived at the abortion clinic, Stone discovered a few people protesting on the sidewalk, but defendant was yelling louder and more frequently than the others. Stone did not ask defendant to stop protesting or to leave the area. Stone merely asked defendant to stop yelling, and when defendant refused, Stone contacted the police. At trial, Stone insisted that his political beliefs on abortion did not affect his decision to report defendant's conduct.

Officer Michael McDonald testified that he responded to the noise complaint and went with Stone to the clinic. Stone identified defendant, who admitted to McDonald that his voice was loud and that he was not shouting to protect any property. McDonald issued defendant a citation for violating the noise ordinance.

Wayne Webster, the owner of the building, testified that, on the morning of the incident, he was on the second floor of the building with the windows closed when he heard shouting from

outside. Defendant was standing on the sidewalk and "screaming in a loud falsetto voice." None of the other protestors was nearly as loud as defendant. Webster was accustomed to protests outside the building, but defendant's falsetto screaming was unusually loud and obnoxious. The building's security cameras recorded the incident, and the City introduced the video at trial. The cameras, which were located inside the building behind closed windows, recorded sounds but did not amplify them. Webster identified a particular portion of the video in which defendant repeatedly shouted "mommy, daddy, don't kill me" toward people walking from the parking lot to the clinic.

William Landerholm testified that he protested on the sidewalk with defendant on the day of the incident. Landerholm testified that he and defendant took turns "lifting up [their] voices" to discourage the workers and patients from entering the facility. The protesters also used literature, graphic signs, and street theater to convey their message. When Stone complained about the noise, defendant explained that he and Landerholm needed to raise their voices because music was playing in the parking lot to drown out the protesters. Landerholm believed that Stone complained only because he disliked the protesters' message.

Defendant testified that he frequently protested outside the clinic. While shouting "mommy, please don't kill me," defendant used a falsetto voice to imitate a baby. He admitted that other methods were available for conveying his message. No one asked defendant to stop protesting; Stone and Webster merely asked him to lower his voice.

The trial court found defendant guilty by a preponderance of the evidence after reviewing the video and crediting the testimony of Stone and Webster. The court noted that (1) only the volume of defendant's protest was restrained, (2) he had other means of conveying his message, and (3) the combination of loud volume and whiny repetitiveness made defendant's

shouting annoying. The trial court imposed a $100 fine, and defendant filed a motion for a new trial. The court denied the motion, and this timely appeal followed.

ANALYSIS

On appeal, defendant argues that (1) the noise ordinance is unconstitutionally vague because it does not specify a maximum permitted decibel level, (2) his first amendment right to free speech trumps the public's right to be free from annoying noise, and (3) even if the ordinance is constitutional, the City did not prove a violation.

Municipal ordinances are presumed constitutional. *Van Harken v. City of Chicago*, 305 Ill. App. 3d 972, 976 (1999), citing *City of Chicago Heights v. Public Service Co. of Northern Illinois*, 408 Ill. 604, 609 (1951). The appellate court employs a *de novo* standard of review in examining the constitutionality of an ordinance. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000).

Defendant initially contends that the ordinance is unconstitutionally vague because it does not specify a maximum permitted decibel level. Due process is violated if a law is so vague and devoid of standards that it leaves the public unsure of what is and what is not prohibited or if it lacks adequate guidelines for the administrative body that must enforce it. *City of Aurora v. Navar*, 210 Ill. App. 3d 126, 132 (1991). The language of an ordinance must convey sufficiently definite warning of what conduct is prescribed, and the adequacy of such notice is measured by common understanding and practices. *Navar*, 210 Ill. App. 3d at 133.

In *Navar*, the defendant was prosecuted under an ordinance prohibiting commercial activity which was "audible" from "adjacent premises" after 9 p.m. This court concluded that the city intended only to proscribe sound which created a nuisance. However, the plain language of the ordinance punished both annoying sounds and those which did not create a nuisance.

Therefore, we held that the ordinance was unconstitutionally vague because it did not warn the public or the enforcement authorities of what conduct was prohibited. *Navar*, 210 Ill. App. 3d at 134. The noise ordinance in this case prohibits only unnecessary or unusual noise that "annoys, injures, or endangers the comfort, repose, health, or safety of others." An "unnecessary" or "unusual" noise is one that is not required to alert others of an emergency. Therefore, the ordinance in this case is distinguishable from the one in *Navar*.

Our supreme court has held that an ordinance restricting noise of a "disagreeable or annoying nature" was not unconstitutionally vague. *City of Chicago v. Reuter Brothers Iron Works, Inc.*, 398 Ill. 202, 206 (1947). The court noted that the words "disagreeable" and "annoying" had a well-established meaning in the context of common-law nuisance that set forth the duty of those to be regulated. *Reuter*, 398 Ill. at 206-07. The supreme court later reaffirmed *Reuter* in finding constitutional an ordinance that prohibited conduct "disturbing the peace and comfort of occupants of adjacent premises." *Dube v. City of Chicago*, 7 Ill. 2d 313, 324 (1955). The appellate court similarly rejected a vagueness challenge to an ordinance prohibiting "loud and raucous sounds." *Town of Normal v. Stelzel*, 109 Ill. App. 3d 836, 840 (1982).

Like the ordinance in this case, the ordinances in *Reuter*, *Dube*, and *Stelzel* did not set a maximum volume level and instead generally prohibited sounds that constituted a nuisance. Therefore, in agreement with those cases, we hold that the plain language of the noise ordinance gives fair notice to the public and to the City that noise creating a nuisance is prohibited. We conclude that the ordinance is not unconstitutionally vague.

We next address defendant's argument that the noise ordinance restricts his right to free speech. The first amendment to the United States Constitution, which applies to the states through the due process clause of the fourteenth amendment, prohibits governmental action that denies or abridges freedom

of speech. U.S. Const., amends. I, XIV. There is no dispute that Rockford's noise ordinance places restrictions on expression protected by the first amendment. The ordinance restricts an individual's right to audible expression in a public forum by limiting the volume of that expression.

Nevertheless, it is well established that the government may, "'within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.'" *People v. Jones*, 188 Ill. 2d 352, 356 (1999), quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 129 L. Ed. 2d 36, 43, 114 S. Ct. 2038, 2041 (1994). The first amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. A state may therefore impose reasonable restrictions on the time, place or manner of constitutionally protected speech occurring in a public forum. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 675, 109 S. Ct. 2746, 2753 (1989). A valid "time, place, and manner" regulation, however, must be content-neutral.

A regulation is content-neutral if it is "'justified without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791, 105 L. Ed. 2d at 675, 109 S. Ct. at 2753, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 227, 104 S. Ct. 3065, 3069 (1984). Generally, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content-neutral. *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 643, 129 L. Ed. 2d 497, 518, 114 S. Ct. 2445, 2459 (1994). For instance, an ordinance prohibiting the posting of signs on public property was held to be content-neutral because it applied to all signs and was silent concerning any speaker's point of view. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 80 L. Ed. 2d 772, 786-87, 104 S. Ct. 2118, 2128 (1984).

In *Jones*, our supreme court recently examined the constitutionality of a statute that prohibited a driver from

operating a vehicle's sound amplification system so that it could be heard at least 75 feet away. The court held that the statute was not content-neutral because it expressly exempted vehicles engaged in advertising, a certain type of speech. *Jones*, 188 Ill. 2d at 360-61. *Jones* is consistent with the Supreme Court's holding that "a prohibition against the use of sound trucks emitting 'loud and raucous' noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428, 123 L. Ed. 2d 99, 116, 113 S. Ct. 1505, 1517, quoting *Kovacs v. Cooper*, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949). The noise ordinance in this case does not mention any type of speech; it merely prohibits unnecessary sound that interferes with others' comfort, repose, health, or safety. Therefore, we conclude that the ordinance is content-neutral.

A content-neutral time, place, and manner regulation is subjected to an "intermediate level of scrutiny." *Turner*, 512 U.S. at 662, 129 L. Ed. 2d at 530, 114 S. Ct. at 2469. To pass constitutional muster, such regulations must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication of the information. *Ward*, 491 U.S. at 791, 105 L. Ed. 2d at 675, 109 S. Ct. at 2753; *Community for Creative Non-Violence*, 468 U.S. at 293, 82 L. Ed. 2d at 227, 104 S. Ct. at 3069.

Defendant admitted at trial that he had alternative means of conveying his anti-abortion message to workers and patients entering the clinic. On the day of the incident, he and the other protesters distributed literature and displayed signs to emphasize their point. Defendant argues that his shouting was necessary "for those few moments" when a worker or patient passed behind a privacy fence in the parking lot before entering the building. Notwithstanding the privacy fence, we conclude that defendant had adequate alternative methods for communicating his message because the people arriving at the clinic walked or drove past the protesters before entering the parking lot. We

further conclude that, because the ordinance prohibits only sounds creating a nuisance, the ordinance was narrowly tailored to serve the significant government interest of regulating noise. Therefore, we reject defendant's argument that the ordinance unconstitutionally restricts his freedom of speech.

Finally, defendant challenges the sufficiency of the evidence. The enforcement of an ordinance is quasi-criminal, but it is tried and reviewed as a civil proceeding. *Village of Kildeer v. LaRocco*, 237 Ill. App. 3d 208, 211 (1992). A city has the burden of proving a violation of an ordinance by a clear preponderance of the evidence. *City of Peoria v. Heim*, 229 Ill. App. 3d 1016, 1017 (1992). On review, a trial court's factual determinations regarding an ordinance violation will not be reversed unless they are contrary to the manifest weight of the evidence. *County of Kankakee v. Anthony*, 304 Ill. App. 3d 1040, 1048 (1999).

In this case, Stone asserted that he was annoyed by defendant who was shouting approximately one block away. However, the defendant was shouting toward the clinic parking lot rather than toward Stone's home, and loud rotary sanders were operating one floor below Stone at the time. Moreover, Landerholm suspected that Stone was annoyed by the protesters' message rather than by the volume of defendant's voice. The trial court credited Stone's testimony despite its inherent implausibility. However, we conclude that a reversal is not necessary because the City presented additional substantial evidence that supports a finding of guilt. *Cf.*, *People v. Lewis*, 165 Ill. 2d 305, 356 (1995) (a single witness's identification of the accused is sufficient to convict if the witness viewed the accused under circumstances permitting a positive identification).

Webster testified that defendant shouted in a "falsetto voice" toward people entering the clinic, and defendant admitted that his voice was "quite loud." The videotape recording of the protest reveals that defendant repeatedly shouted "mommy,

daddy, please don't kill me," in a loud, clear, and shrill voice that could be heard inside the building. Webster testified that the security cameras did not amplify the sounds and that one of the cameras was approximately 100 feet from defendant. The videotape also shows the parties talking, presumably in a normal tone and volume, but these conversations are nearly inaudible. These facts establish that defendant's shouting was an unusually loud and disruptive nuisance, and it is undisputed that no emergency existed at the time. Therefore, we conclude that the trial court's finding of guilt is not against the manifest weight of the evidence. See *Anthony*, 304 Ill. App. 3d at 1048.

For the preceding reasons, the judgment of the circuit court of Winnebago County is affirmed.

Affirmed.

BYRNE, J., with GROMETER AND KAPALA, JJ., concurring.

APPENDIX B

SUPREME COURT OF ILLINOIS

95600 **CLERK OF THE COURT**
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

April 2, 2003

Ms. Deborah M. Fischer
Attorney at Law
30 Amber Court
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No. 95600 - The City of Rockford, respondent, v. Adrian D. Horien, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 24, 2003.

APPENDIX C

Code of Ordinances, City of Rockford, Illinois (2002):

Chapter 17 NOISE

Sec. 17-1. Findings.

It is recognized that excessive noise endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment.

(Ord. No. 1974-67-0, 4-15-75)

* * *

Sec. 17-3. Vehicular noise generally.

(a) No person shall sound any horn or audible signal device of any motor vehicle of any kind while not in motion, nor shall such horn or signal be sounded under any circumstances except as required by law, nor shall it be sounded for any unnecessary or unreasonable period of time.

(b) A person shall not operate a motor vehicle which is equipped with a muffler or exhaust system or sound muffling device which has been altered or changed to allow noise in violation of these regulations.

* * *

(d) No person shall operate, sell, or offer for sale any motor vehicle subject to registration that will, at any time or under any condition of grade, load, acceleration or deceleration, operate in such a manner as to exceed the following noise limit based on a distance of not less than fifty (50) feet from a center line of travel for the category of motor vehicle indicated:

> Any motor vehicle with a manufacturers GVW rating of 8,000 pounds or more, and any combination of vehicles

towed by such motor vehicle:

35 MPH or less . . . 86dB (A)

Over 35 MPH . . . 90dB (A)

* * *

Sec. 17-3.1. Sound-amplification systems.

(a) *Restriction.* No driver or person in control of any motor vehicle within the city shall operate or permit operation of any sound-amplification system which can be heard outside the vehicle from seventy-five (75) or more feet when the vehicle is being operated or parked upon a highway, unless such system is being operated to request assistance or warn of a hazardous situation.

(b) *Application to emergency vehicles.* This section does not apply to authorized emergency vehicles.

* * *

Sec. 17-4. Boats.

No person shall operate any engine powered watercraft within the City of Rockford in such a manner as to exceed the following noise limit as measured at a distance of not less than fifty (50) feet from the path of travel:

Before January 1, 1975 . . . 85dB (A)

After January 1, 1975 . . . 76 dB (A)

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Sec. 17-6. Construction noise.

It shall be unlawful for any person to use any hammer or power-operated tool for repair or construction purposes between the hours of 10:00 p.m. and 7:00 a.m. within six hundred (600) feet of any building used for residential or hospital purposes. Repairs to public services utilities shall be exempted from this

section.

(Ord. No. 1974-67-0, 4-15-74)

Sec. 17-7. Ground maintenance equipment.

It shall be unlawful to operate any power-driven lawn or garden equipment between the hours of 10:00 p.m. and 7:00 a.m. or any snow blower between the hours of 10:00 p.m. and 5:30 a.m. within six hundred (600) feet of any building used for residential or hospital purposes.

(Ord. No. 1974-67-0, 4-15-74; Ord. No. 1990-294-0, 10-1-90)

Sec. 17-8. Miscellaneous noise sources.

It shall be unlawful to operate the following equipment between the hours of 10:00 p.m. and 7:00 a.m. outdoors within six hundred (600) feet of any building used for residential or hospital purposes if such equipment is audible from any adjacent property used for residential or hospital purposes:

(1) Power-operated models including automobiles, boats and aircraft.

(2) Sound trucks or public address systems.

(3) Musical instruments.

(4) Radios, television sets and phonographs.

(5) Factory time whistles.

(6) Church bells and carillons.

It shall also be unlawful to conduct garbage, yard waste or recycling collection between the hours of 10:00 p.m. and 6:00 a.m. anywhere within the limits of the city.

It shall be unlawful to play music outside at any time using an intercom system on any property abutting or across the street from property zoned and used for residential purposes, if such music is audible more than ten (10) feet from the property from

which the music is operating and it shall be unlawful to play music outside using an intercom system between the hours of 11:00 p.m. and 7:00 a.m. on any property which is abutting or across the street from property zoned and used for residential purposes.

* * *

Sec. 17-10. Nuisance noises.

(a) It shall be unlawful to cause or create any unnecessary or unusual noise at any time which annoys, injures, or endangers the comfort, repose, health or safety of others unless such noise is necessary for the protection or preservation of property or of the health, safety, or life of some person.

(b) No person owning or in possession or control of any building or premises shall use the same, permit the use of the same, or rent the same to be used for any business or employment or residential use, or for any purpose of pleasure or recreation, if such use shall, by its boisterous nature, disturb or destroy the peace of the neighborhood in which such building or premises is situated, or be dangerous or detrimental to health.

(Ord. No. 1974-67-0, 4-15-74)

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Sec. 17-11. Exceptions to regulations.

The following are exempt from the above regulations:

(a) Sirens and bells on emergency vehicles.

(b) Fire and burglar alarms.

(c) Civil defense warning systems.

(d) Train whistles and horns.

(e) Authorized firework displays.

(f) Authorized concerts and parades.

Sec. 17-12. Penalties.

Any person found guilty of violating, disobeying, omitting, neglecting, or refusing to comply with, or resisting or opposing the enforcement of any of the provisions of these regulations, upon conviction thereof, shall be punished by a fine of not less than fifteen dollars ($15.00) nor more than three hundred dollars ($300.00) for the first offense, and not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) for the second and each subsequent offense, in any one hundred eighty-day period, or shall be punishable as a misdemeanor by incarceration for a term not to exceed six (6) months under the procedure set forth in Section 1-2-1.1 of the Illinois Municipal Code, or by both fine and imprisonment. A separate and distinct offense shall be regarded as committed each day on which such person shall continue or permit any such violation, or failure to comply as permitted to exist after notification thereof.

(Ord. No. 1974-67-0, 4-15-74)